determination, the court left untouched a number of important issues in the case—including, of course, the ultimate question whether the merger would be consistent with the public interest because the foreseeable benefits to the public outweighed the foreseeable injury to competition.

DISCUSSION

Appellants ask this Court to grant plenary review of the question whether, in analyzing the competitive effects of a proposed railroad merger as a step in its appraisal of the public interest under Section 5(2) of the Interstate Commerce Act, the Interstate Commerce Commission was required to determine whether the merger violated the standards of Section 7 of the Clayton Act.[1] We think the court below erred in holding that the Commission was required to make that determination, and we believe that its error may appropriately be corrected by this Court summarily. See *United States* v. *Bliss & Laughlin, Inc.*, 371 U.S. 70; *Arrow Co.* v. *Cincinnati, N.O. & T.P.R.*, 379 U.S. 642; *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 355 U.S. 175. In suggesting summary disposition, however, we do not contend that the Commission's analysis of competitive effects was adequate. The Department of Justice urged below that, tested by proper criteria, the Commission's findings in this

[1] Section 7, 15 U.S.C. 18, proscribes corporate mergers or acquisitions where, "in any line of commerce in any section of the country," the effect "may be substantially to lessen competition, or to tend to create a monopoly." Section 7 concededly is not applicable to mergers approved by the ICC. See Section 5(11) of the Interstate Commerce Act, 49 U.S.C. § 5(11).

case were *not* adequate, and we would renew that contention on a remand. But the question of the adequacy of the Commission's findings, in our view, is not ripe for decision by this Court at this time. The task of reviewing an administrative order and its underlying findings is primarily that of the three-judge district court, not this Court, whose practice is "not to review an administrative record in the first instance" (*United States* v. *Great Northern R. Co.*, 343 U.S. 562, 578). In basing its decision upon a single erroneous factor, the district court did not adequately review the administrative record. The case should be returned to the district court for a fresh scrutiny of the Commission's findings and order free of the incorrect view that the Commission is required to determine whether the proposed merger would violate Section 7 of the Clayton Act.

1. This Court, in *McLean Trucking Co.* v. *United States*, 321 U.S. 67, and more recently in *Minneapolis and St. L. Ry. Co.* v. *United States*, 361 U.S. 173, has made clear that the Commission, in determining whether a merger subject to the Commission's approval meets the statutory test of consistency with the public interest, "must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation" (321 U.S. at 87), and must consider those effects along with the anticipated benefits. For, though the statutes governing approval of rail mergers do not expressly mention competition, Congress has directed the Commission, in the performance of its regulatory duties, to promote "adequate, economical, and efficient

service" and "sound economic conditions in transportation" (National Transportation Policy, 49 U.S.C. preceding Section 1). Competition has traditionally been regarded as a critical force for the promotion of economic efficiency and progress, and distinguished students of transportation policy have urged that greater reliance be placed upon it as a method of fostering efficient and progressive transportation service.[2] We deem it essential, therefore, that the Commission make an adequate analysis of the competitive effects of any proposed merger that it is asked to approve and thereby immunize from antitrust attack.

The Commission's duty of analysis is, of course, not discharged if the Commission merely recites, without supporting analysis, that the merger has no adverse effect on competition; or bases its conclusion upon an inadequate grasp of the economics of competition; or ignores the teachings contained in this Court's antitrust decisions (insofar as the analysis of competition found in such cases may be useful in appraising competitive problems in the railroad industry). Certainly, the Commission may not rest with "vague or insufficient findings" (J.S. App. I, p. 12) on competition. Especially in a case like the present one, involving a proposed merger of great magnitude and far-reaching implications for the future structure of the railroad industry, it is the proper office of judi-

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[2] See, *e.g.*, Meyer, Peck, Stenason, and Zwick, *The Economics of Competition in the Transportation Industries* (1959); Nelson, *Railroad Transportation and Public Policy* (1959), p. 428; Fulda, *Antitrust Aspects of Recent Transportation Mergers*, 48 Minn. L. Rev. 723 (1964).

cial review to insist upon an adequate and probing, and not merely perfunctory or superficial, analysis by the Commission of the merger's competitive effects.

2. However, while emphatically agreeing with the court below upon the need for adequate standards in the appraisal of the competitive effects of rail mergers—standards drawn not merely from the Commission's specialized knowledge of railroad and transportation conditions and practices, but from sound economic principles of competition and from the experience of the courts in analyzing anticompetitive consequences of mergers under the antitrust laws—we think the court went astray in holding that the Commission is required to decide whether a merger which it is asked to approve violates the standard of Section 7 of the Clayton Act.

The court reasoned that such requirement is imposed by Section 11 of the Clayton Act, which empowers the Commission to enforce Section 7 against common carriers subject to the Interstate Commerce Act. However, Section 11 only authorizes the Commission to enforce Section 7 "where applicable to" such carriers; and Section 7, which expressly provides that "[n]othing contained in this section shall apply to transactions duly consummated pursuant to authority given by the * * * Interstate Commerce Commission * * * under any statutory provision vesting such power in such Commission," is inapplicable to mergers appraised by the Commission under Section 5(2) of the Interstate Commerce Act—as in the present case.

Moreover, the requirement that the Commission make a Section 7 finding misconceives the Commis-

sion's function in a rail merger case and might well aggravate the very danger that it is intended to avert—the danger of deficient appraisal by the Commission of the competitive effects of a merger subject to its approval power. The function of the Commission (unlike a Section 7 court) in a merger case is to weigh the anticompetitive effects of the merger against the benefits that the merger is expected to produce. But the ultimate finding required in a Section 7 case (*i.e.*, whether the effect of the challenged merger may be substantially to lessen competition in any market) tells little about the magnitude or scope of the adverse competitive consequences of the merger, save only to say that they are sufficient to invoke the bar of the statute. Such a conclusory finding is not very helpful to an agency required to balance a lessening of competition against other public-interest factors in passing on a merger; it is not sufficiently refined for the agency's balancing task. What the agency needs to know in order to perform its statutory function properly is not whether the merger has the anticompetitive effects proscribed by Section 7 but how substantial and widespread those effects are.

Suppose, for example, that a railroad merger is proposed that would produce substantial public benefits and, at the same time, great competitive harms in many markets—far greater harms than must be shown to prove a violation of Section 7, a statute aimed at arresting anticompetitive tendencies in their incipiency. In such a case, a finding merely that the merger was

contrary to Section 7—the only finding the Commission would be required, under the district court's view, to make—would seriously understate the merger's actual adverse competitive impact. Contrariwise, in a case where the injury to competition was relatively slight but the public benefits from the merger were also slight, the opinion of the court below might lead the Commission to take no cognizance whatever of the competitive harms, since they would fall short of the threshold of Section 7. Thus, the practical effect of the district court's ruling could, in many cases, be to mask the actual anticompetitive effects of railroad mergers.

3. In urging that this Court reject the rule adopted below—and in suggesting that the Court may with propriety do this summarily—we stress our complete agreement with the district court that the Commission is not free to make a perfunctory or superficial analysis of competition in a merger case; that it must apply standards grounded not only in its expert knowledge of railroad conditions but also in sound economic principles and the policy underlying the antitrust laws; and that exacting judicial review of the Commission's competitive findings is required. But we think the Commission can best be held to high standards in this area by careful and meticulous judicial scrutiny of the adequacy of its findings, rather than by compelling it, without basis in the governing statutes or in the Commission's function in a merger case, to act the precise role of a Section 7 court. In ruling that the Commission was required to do the

latter, the court below failed to do the former. In deciding that the Commission's order must be set aside for a failure to test the merger by the standards of Section 7 of the Clayton Act, it did not scrutinize the adequacy of the Commission's findings in detail. Specifically, it did not fully analyze the adequacy of the Commission's findings on competition, including the Commission's treatment of the Florida market and of intermodal competition, or examine the substantiality of the evidence to support these findings; nor did it consider such judgments made by the Commission as whether railroad regulation is sufficiently comprehensive to reduce significantly the importance of rail competition. The district court should address itself to these questions before a plenary consideration of them by this Court. The district court's answers to these questions could well obviate the need for further review by this Court; it would at least facilitate such review.

We therefore urge the Court to return the case to the district court for further review of the administrative order and findings. We do not think that the Court should at this juncture attempt to elaborate standards to guide the district courts in reviewing cases of this kind. That would be premature. It is likely that once the issue whether the Commission erred in failing to test the validity of the merger under Section 7 is excised from this case, the court below will not encounter undue difficulty in determining the adequacy of the Commission's competitive findings. If, for example, the court below finds that

the Commission's findings on competitive effects are "vague or insufficient" (as the Department of Justice argued below), that would be a proper basis for setting aside the Commission's order and returning the case to the Commission for the making of adequate and intelligible findings. See, *e.g., Northeast Airlines, Inc.* v. *Civil Aeronautics Board,* 331 F. 2d 579 (C.A. 1). Should a problem in the definition or application of the proper reviewing standards arise on remand to the district court, the case will then be ripe for plenary consideration here.

CONCLUSION

We accordingly suggest that the judgment of the district court should be vacated and the case remanded to that court with directions to make a fresh review of the adequacy of the Commission's findings without applying the erroneous standard of its first decision.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
RICHARD A. POSNER,
Assistant to the Solicitor General.
LIONEL KESTENBAUM,
A. PAUL VICTOR,
Attorneys.

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